

ORC Comments on three topics: 1. Public meeting and NCP, 2. Inadequate public comment, and 3. Specific ARARs requiring a public meeting. Text key word search conducted using terms “NCP”, “Public”, “Meeting.”

TOPIC 1. “DOE not compliant with NCP over public meeting requirements:”

Comment #17. Decision Summary, Section 2.3, page 2-9. In the first paragraph, DOE states that it has surpassed CERCLA requirements for public engagement. This does not appear to be accurate, since it is not clear that the NCP requirements at 40 CFR § 300.430(f)(3), have been met. See comment on Decision Summary Section 2.10.9 below.

Comment # 30. Decision Summary, Section 2.10.9, page 2-29 to 2-30. DOE’s statement that it “obtained public input on the proposed action for onsite disposal of Oak Ridge NPL Site CERCLA waste at EMDF” should be qualified since information collected after the proposed plan was not made available to the public for consideration. The original Proposed Plan for on-site CERCLA waste disposal was issued to the public (September 10, 2018) and comments were sought through early 2019. Since EPA and TDEC had not approved the RI/FS, DOE included a draft RI/FS in the Proposed Plan that was subject to public comment. After the original Proposed Plan was published, DOE obtained groundwater elevation data which it documented in Technical Memorandum 2, which indicated groundwater elevations higher than projected in the RI/FS. In addition, the ROD discusses using “mechanically stabilized earth” in its construction of the landfill, which may raise the elevation of the landfill above that envisioned during public comment. Further, EPA Region 4 Administrator issued a written position on the Waste Water FFS dispute (March 21, 2019) and the EPA Administrator Andrew Wheeler issued a decision on the Waste Water FFS dispute (December 30, 2020). In addition, DOE has made available a Revised D3 Waste Water FFS (June 23, 2021) for regulator review that includes new information including PRGs in the form of discharge limits for radionuclides significantly higher than those in the D2 FFS available at the time of 2018-2019 public comment. Under the NCP, the new information described above should be made available for public review and comment in a Proposed Plan consistent with 40 CFR § 300.430(f)(3) before it can issue a ROD with a selected remedy which includes discharges of wastewater from the EMDF landfill along with effluent limits identified as cleanup levels. Thus, the ROD will need to be revised, at a minimum, to include additional responses to any received public comments in the Responsiveness Summary and the remedy may need to be revised in response to public comments as part of the NCP’s Modifying Criteria for community acceptance.

TOPIC 2. “Inadequate public comment:”

Comment #6. Declaration, Section 1.2, page 1-4, sixth paragraph. This paragraph discusses the public comment period. It should be noted that at least two elements of the Administrative Record were not complete at the time that the public comment period was held. In addition to the RI/FS (discussed in comment above), Tech Memo 2, which provided additional “wet weather” groundwater elevation information, was not complete until after the Proposed Plan was published for public comment and therefore represented a gap in the Administrative Record at the time that the Proposed Plan was published. An additional and significant gap in the Administrative Record is the lack of an approved Waste Water FFS, which should have included preliminary remedial goals (PRGs) for the discharge of waste water. This gap in the Administrative Record should be addressed consistent with the community relations to support the selection of remedy requirements at 40 CFR § 300.430(f)(3). Because the only

public comment period was before the finalization of Tech Memo 2 and the Revised FFS, it can be argued that the public has not had a “reasonable opportunity” to submit comments on the proposed plan, “including the RI/FS.” So, while remedy decision making should “factor[] in any new information or points of view expressed by the state (or support agency) and community during the public comment period,” the public has not had an opportunity to comment on a landfill based on a higher-than-projected water table or PRGs for the discharge of landfill waste water into surface water, including but not limited to Bear Creek.

Comment #11. Declaration, Section 1.4, pages 1-6 and 1-7, bullets. **NOTE to Program— this comment is directed to the EPA program to confirm.** In the fourth, tenth and last bullets, please confirm whether the “clean fill dike” and the “mechanically stabilized earth” were part of the alternative presented to the public. If not, consider and determine whether it is a significant change to the remedy, and could the public have reasonably anticipated it? If the public could not have reasonably anticipated a significant change based on the Proposed Plan and Administrative Record published at the time of public comment, this would trigger an additional public comment period under 40 CFR 300.430(f)(3)(ii).

Comment # 20. Decision Summary, Section 2.4, page 2-11. The last paragraph states that DOE has completed the required public review and comment. As noted in several comments, this is not supported by the facts or the Administrative Record.

Comment #30. See above.

Comment #34. Decision Summary, Section 2.12.2, page 2-37. **NOTE to Program – as with comment 11, this comment is directed to the EPA program to confirm.** Please confirm whether the “clean fill dike” and the “mechanically stabilized earth” were part of the alternative presented to the public. If not, consider and determine whether it is a significant change to the remedy, and could the public have reasonably anticipated it? If the public could not have reasonably anticipated this change based on the Proposed Plan and Administrative Record published at the time of public comment, this could trigger an additional public comment period under 40 CFR 300.430(f)(3)(ii).

Comment #46. Decision Summary, Section 2.13.2.1, page 2-51. This section describes the basis of the waivers from the TSCA requirements, including the requirement that “[t]he bottom of the landfill liner system or natural in-place soil barrier shall be at least fifty feet from the historical high-water table.”

Note to Program: Please confirm that EPA has confirmed with a landfill expert that operation of the landfill as designed “will not present an unreasonable risk of injury to health or the environment from PCBs.” In addition to supporting a waiver, EPA must confirm that the remedy will be protective, consistent with comments from the EPA Remedy Review Board and the December 7, 2017, Dispute Resolution Agreement, including its attachment, RI/FS Appendix G.

In addition, this section states that certain TSCA requirements in 40 CFR § 761.75(b) have been met because DOE concludes that this is a post-construction requirement. Part of the RI/FS dispute was on this very point. EPA did not agree at that time and negotiated an agreed Appendix G as an attachment to the December 7, 2017 Dispute Resolution Agreement. Please confirm that the project team has agreed with this and then discuss with ORC. This DOE assertion that it meets a requirement that it concluded it would not meet and warranted a waiver represents a post-Proposed Plan change to the action and should be evaluated whether it is a significant change and whether the public has had an opportunity to comment on this.

Further, the ARAR waiver discussion in the RI/FS Appendix G appears to have had significantly more information than is presented in the ROD. Please compare to ensure that information has not been omitted that EPA would consider to be necessary or helpful in demonstrating the basis for the waiver as well as the additional requirement that, despite the waiver, the remedy is protective. I have attached the DRA with Appendix G with my comments.

Lastly, DOE suggested on an August 12, 2021 call that the waiver might be granted after the ROD was signed. That is inconsistent with the NCP at 40 CFR § 300.430(f)(5)(ii), “The ROD shall describe the following statutory requirements, [including t]he applicable or relevant and appropriate requirements of other federal and state laws that the remedy will not meet, the waiver invoked, and the justification for invoking the waiver.” This does not prevent DOE from making its demonstration that it may want a different landfill design, but at that point, DOE will, again, have to justify a waiver, and EPA and TDEC will need to approve it. ORC recommends that Region include a comment that a post ROD waiver of any identified ARAR would require another EPA approved decision document AROD or ESD providing justification for invoking a waiver as required by the aforementioned NCP provision.

Comment # 51. Responsiveness Summary. **NOTE to Program** – please confirm that EPA has reviewed the comments transmitted during the public comment period, that DOE has met the standard in 40 CFR 300.430(f)(3)(i)(F) to “[p]repare a written summary of significant comments, criticisms, and new relevant information submitted during the public comment period and the lead agency response to each issue,” and that EPA agrees with or finds acceptable DOE’s responses to those comments, criticisms, and new relevant information.

Comment to DOE: There are several instances in the responsiveness summary and elsewhere that its waivers are being conducted under CERCLA Section 121(d)(4), the “equivalent standard of protectiveness” ARAR wavier. This is not correct and was one of the issues raised by EPA and dealt with under the resolution of the RI/FS dispute (in the DRA attachment Appendix G). Please correct any responses by removing discussion of waivers under CERCLA 121(d)(4) and clarify that the waivers are being evaluated under TSCA (40 CFR 761.73(c)) and the Department of Radiation Health (TDEC 0400-20-04-.08)).

TOPIC 3. Specific ARAR references to need for a public meeting (None found in text search).